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SERVICE ON ATTORNEY GENERAL AND DISTRICT ATTORNEY REQUIRED BY BUS. & PROF. CODE, §17209 AND CAL. RULES OF COURT, RULE 8.212(C).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

JENNIFER AUGUSTUS et al.,
Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC., formerly d.b.a. AMERICAN COMMERCIAL SECURITY SERVICES, INC.,
Defendant and Appellant.

APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT
JOHN WILEY, JR., JUDGE • CASE NOS. BC336416, BC345918 AND CG5444421

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF SECURITY COMPANIES, AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES IN SUPPORT OF DEFENDANT AND APPELLANT ABM SECURITY SERVICES, INC.; [PROPOSED ORDER]

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF SECURITY COMPANIES, AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES IN SUPPORT OF DEFENDANT AND APPELLANT ABM SECURITY SERVICES, INC.

Under California Rules of Court, rule 8.200(c), the Chamber of Commerce of the United States of America (the Chamber), the National Association of Security Companies (NASCO), and the California Association of Licensed Security Agencies (CALSAGA) request permission to file the attached amici curiae brief in support of defendant and appellant ABM Security Services, Inc.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, their members, or their counsel made a monetary contribution intended (continued...)

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size. The Chamber has many members located in California and other members who conduct substantial business in the state. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community.

Few litigation issues are of greater concern to American business than those involving class actions, and this case raises two class issues that are particularly pressing: class certification when the plaintiff challenges employment policies that are neither uniform nor consistently applied, and the use of statistical sampling to preclude the defendant from presenting defenses to the claims of individual class members.

Plaintiffs here pled class claims that have become increasingly common—alleging that the defendant's employment policies violated the wage and hour laws. For the reasons that defendant ABM Security Services, Inc. has shown in its appellate briefs, the trial court erred in granting summary judgment in favor of plaintiffs. The trial court erroneously concluded that an employer fails to provide a lawful rest break merely because the employee

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(...continued)
to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

carries a radio and thus could potentially be called back to work in an emergency.

But even before granting summary judgment, the trial court erred by certifying a class action. Plaintiffs failed to show the *uniform* application of a common employment policy. The trial court mistakenly relied on and then misapplied California authorities governing compensable time. Under those authorities, whether time is compensable hinges on a fact-specific, multifactor analysis addressing such matters as " 'whether the employee had *actually* engaged in personal activities during call-in time,' " " 'whether the frequency of calls was *unduly* restrictive,' " and " 'whether use of a pager could *ease* restrictions.' " (*Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 523-524 (*Gomez*), emphases added, quoting *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 351.) Yet, as defendant has shown in its appellate briefs, the trial court ignored key evidence showing the predominance of individual issues under this multifactor test, including "that interruptions are so rare that [ABM's] guards [were] effectively getting their breaks." (13 JA 3757.) As one manager testified, the nature of the rest breaks defendant provided "vary from scenario to scenario," "vary from the time frame of the day," and "vary from the location." (11 JA 3101.) Nonetheless, the trial court ignored these differences and mistakenly concluded it was "*irrelevant* that an employee may read or engage in other personal activities during 'down time.' " (13 JA 3760, emphasis added.)

Certification was therefore erroneous because this multifactor test, if correctly applied, would have required unmanageable

individualized inquiries regarding the individual circumstances of each class member. As a result, the class claims could have been tried only by using statistical sampling to establish class liability and to restrict the fundamental right of the defendant to defend itself. But if such use of statistical sampling were permitted here, it would likely lead in other cases to the violation of the fundamental due process rights of the Chamber's members and all companies doing business in California by denying them the right to present their individualized defenses to liability and damages.

Moreover, even without regard to the multifactor test, plaintiffs failed to show the predominance of common issues because a significant number of class members were uninjured yet still will recover compensation for rest breaks they never actually missed. A number of class members testified they were *never* called back to work during a break. (23 JA 6779; 24 JA 6806, 6828.) And even the trial court recognized that another class member "testified [at his deposition] that he did not carry a radio on certain 'breaks.' " (MJN, Declaration of Theane Evangelis, exh. A, p. 2.) Yet all will recover windfall damages. Defendant was denied its due process right to show its individualized defenses to the claims of such uninjured class members.

NASCO is the nation's largest contract security trade association, representing private security companies servicing every business sector. Its members employ more than 250,000 of the nation's most highly trained security officers. NASCO is leading efforts to set meaningful standards for the private security industry and security officers by monitoring legislation, regulations, and

legal developments affecting the quality and effectiveness of private security services. NASCO is dedicated to promoting higher standards, consistent regulations, and ethical conduct for private security businesses, and to increasing awareness and understanding among policymakers, the media, and the general public regarding the important role that private security plays in safeguarding people, property, and assets.

CALSAGA is a nonprofit industry association that serves as the voice of the private security industry in California. It is the only association in California dedicated to advocating on behalf of contract and proprietary security organizations. CALSAGA has led efforts to professionalize the industry and to bring greater accountability in licensing, training, compliance, and background screening. These efforts have helped make California a national leader in security standards. CALSAGA members range from small firms to some of the world's largest private security companies and include everything in between. For years, CALSAGA's key missions have included assisting members with best practices regarding wage-hour-payroll compliance issues, and tracking the explosive growth of wage and hour class action lawsuits against security employers.

Amici NASCO and CALSAGA directly or through their members employ thousands of people across California providing security services to a wide range of businesses and government agencies. Like many California employers, companies in the security industry have been the frequent targets of wage and hour class actions, particularly over the last decade, and thus have a

substantial interest in ensuring that employers are allowed to adequately defend themselves in such actions.

Because the " 'grant of class status can propel the stakes of a case into the stratosphere' " (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1453), improper certification of class actions can have a devastating in terrorem effect that forces the settlement of even the most frivolous claims. Accordingly, amici are deeply interested in ensuring that courts do not improperly certify cases for class treatment where, as here, doing so would impermissibly alter substantive law and violate the due process rights of the defendant.

Counsel for amici have reviewed the briefs on the merits filed in this case and believe this court will benefit from additional briefing regarding the dangers of permitting class certification when the plaintiff challenges employment policies that either are not uniform or are not consistently applied, and of permitting statistical sampling to preclude individual defenses to liability and damages.

Accordingly, amici request that this court accept and file the attached amici curiae brief.

May 5, 2014

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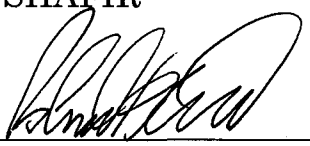
By: 
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AMICI CURIAE BRIEF

INTRODUCTION

When plaintiffs move to certify a class action challenging an employment policy, but cannot show that the policy is both uniform and consistently applied to the individual class members, a trial court cannot properly grant class certification because individualized issues predominate and the trial of such class claims would be unmanageable. Such individualized issues necessarily affect fundamental issues of liability, not just the calculation of damages, because the nature and application of the employment policies will determine whether individual class members have any right to recover at all.

Here, the trial court's erroneous grant of summary judgment allowed plaintiffs to circumvent a class action trial that would have impermissibly violated defendant's due process rights and been rendered unmanageable by individualized issues. For the reasons stated by defendant in its appellate briefs, the summary judgment should be reversed. But the Court of Appeal should not stop there. The grant of summary judgment only confirms the fundamental due process concerns at all levels of the case, including the erroneous grant of class certification. For just as summary judgment is improper when the claims raise numerous triable issues of fact, class certification is improper when the individualized issues predominate.

To shortcut such individual issues, plaintiffs in other cases have resorted to the use of statistical sampling to attempt to establish both class liability and damages. Here, but for the grant of summary judgment, plaintiffs would have had no choice but to do so as well. However, such uses of statistical sampling, if permitted, would violate the fundamental due process right of defendants to present all individualized defenses. Such a "Trial by Formula" would undermine the rights not just of the defendant in this case, but of amici, their members, and all companies doing business in California. (*Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __ [131 S.Ct. 2541, 2561, 180 L.Ed.2d 374] (*Wal-Mart*).)

" ' "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." ' " (*Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1128 (*Lopez*), quoting *Wal-Mart*, *supra*, 131 S.Ct. at p. 2551.) Here, plaintiffs' claims did not involve the kinds of common questions that can support class certification under *Wal-Mart* and could not generate the common answers necessary to justify class certification.

"[A] common question predominates when 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.' " (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 501 (*City of San Diego*), quoting *Wal-Mart*, *supra*, 131 S.Ct. at p. 2551.) But there were no such issues here because plaintiffs challenged employment policies that were not uniform and not consistently applied to the class. As a result,

plaintiffs could not have resolved the issues central to the validity of their claims in one stroke. Instead, the resolution of their claims on a classwide basis would improperly necessitate inquiries regarding over 14,000 individual class members at different worksites and under different circumstances. The absence of common questions, much less common answers to those questions, prevented certification of the class.

Moreover, the individuality regarding the right to recover that precluded certification here is not a damages issue, but a liability issue. And the California Supreme Court has repeatedly held that individuality regarding the right to recover precludes class certification.

The answer to these unmanageable individualized inquiries cannot be the shortcut of statistical sampling. Both the United States and California Constitutions guarantee a litigant the due process right to a full opportunity to present every available defense to the claims against it. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, §§ 7, 15.) That right applies fully in a class action. When the defendant has presented evidence showing a defense to the claims of at least some members of the class, statistical sampling that allows liability to be extrapolated from a mere sampling of the class—without considering the evidence of individual defenses—abrogates the defendant's right to prove it is not liable. Such misuse of statistical sampling violates the defendant's due process right to defend the claims against it.

Class actions in California are procedural devices that cannot be altered by courts to modify substantive law. On this basis, the

United States Supreme Court has rejected the type of "Trial by Formula" that was threatened here. (*Wal-Mart, supra,* 131 S.Ct. at p. 2561; see also *Comcast Corp. v. Behrend* (2013) 569 U.S. __ [133 S.Ct. 1426, 1433, 185 L.Ed.2d 515] (*Comcast*) ["a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory"].) The United States Supreme Court has held that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." (*Wal-Mart,* at p. 2561.) Such an approach would modify substantive law and, indeed, would jeopardize the defendant's due process rights. Likewise, because the class certification here would have required unmanageable individualized inquiries, the claims could have been tried only by the misuse of statistical sampling, extrapolation, or other impermissible shortcuts. The class certification therefore would have prevented the defendant from proving its individual defenses to liability, and must be rejected as an impermissible modification of the substantive law and an infringement of the defendant's constitutional rights.

Even a trial by formula ostensibly limited to damages would violate due process. To the extent that California courts have ever recognized a general "rule of thumb" that individualized damages issues do not preclude class certification—a general rule of thumb that does not apply to the right to recover here—that rule can no longer be considered viable in light of the intervening *Wal-Mart* and *Comcast* decisions. The United States Supreme Court's prohibition on the misuse of statistical sampling reflects limitations imposed by

constitutional due process guarantees and any contrary state law rule must give way under the United States Constitution.

LEGAL ARGUMENT

I. CLASS CERTIFICATION IS IMPERMISSIBLE WHEN THE PLAINTIFF CHALLENGES EMPLOYMENT POLICIES THAT ARE NOT UNIFORM OR COMMON.

A. To establish the predominance of common issues required for class certification, plaintiffs must show the uniform application of a common policy.

Before a trial court can certify a class action, "[t]he party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) To demonstrate "a well-defined community of interest," plaintiffs are required to show, among other things, " 'predominant common questions of law or fact.' " (*Ibid.*, quoting *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside Bank*).)

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so

numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) " '[W]hat really matters to class certification' is 'not similarity at some unspecified level of generality but, rather, dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceeding.' " (*Id.* at p. 1022, fn. 5.)

When a uniform employment policy that allegedly violates wage and hour laws is applied on a consistent, classwide basis, that policy may support class certification because resolution of the policy's legality may show liability to the class. (See *Brinker*, *supra*, 53 Cal.4th at p. 1033 [courts "routinely" find suitable for class treatment "[c]laims alleging that a *uniform policy consistently applied* to a group of employees is in violation of the wage and hour laws" (emphasis added)].) But class certification is impermissible when the plaintiff challenges an employment policy that is either not uniform or is not applied on a consistent, classwide basis, because such a policy cannot show that the class members' claims will be resolved through a unified proceeding in which common issues will predominate.

In *Brinker*, the central issue, as here, was predominance—"whether individual questions or questions of common or general interest predominate." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) Plaintiffs challenged their employer's rest break and off-the-clock policies. Their employer "conceded . . . the existence of, a *common, uniform rest break policy*." (*Id.* at p. 1033, emphasis added.) As a result, the plaintiffs' first theory of liability—that the rest break

policy violated the wage order requirements—presented a common question and the trial court properly exercised its discretion to certify a rest break subclass. (*Ibid.*)

However, the Supreme Court held that the trial court abused its discretion by certifying a subclass on plaintiffs' off-the-clock claim. (*Brinker*, *supra*, 53 Cal.4th at pp. 1051-1052.) Plaintiffs presented no evidence of a uniform or common off-the-clock policy: "Unlike for the rest period claim and subclass, for this claim neither a common policy nor a common method of proof is apparent." (*Id.* at p. 1051.) Certification was thus error: "[W]here no substantial evidence points to a uniform, companywide policy, proof of . . . liability would have had to continue in an employee-by-employee fashion . . . ." (*Id.* at p. 1052.) *Brinker* thus establishes that lawsuits alleging violations of California's wage and hour laws are not susceptible to class treatment "in the absence of evidence of a uniform policy or practice." (*Ibid.*)

But *Brinker* also confirms that mere evidence of a uniform *policy* does not alone suffice to justify class treatment—evidence of that policy's consistent *application* to employees is also required. The critical inquiry is whether the "uniform policy [was] consistently *applied* to a group of employees." (*Brinker*, *supra*, 53 Cal.4th at p. 1033, emphasis added.) Where the alleged violation of the wage and hour laws involves the nonuniform application of a uniform policy, "courts have routinely concluded that an individualized inquiry is necessary" and defeats class certification. (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 153-154 (*Soderstedt*) [affirming denial of class

certification because, although defendant "maintained uniform internal policies," evidence "showed that the manner in which those policies and standards were implemented" varied].) Thus, unless a uniform policy is consistently *applied* on a classwide basis, class certification is improper because individual class members would be required to litigate their right to recover even following entry of a class judgment.

Brinker builds on a strong foundation of California Supreme Court authority. "Plaintiffs' burden on moving for class certification . . . is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate.* [Citation.] . . . '[T]his means "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment . . . ." ' " (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108 (*Lockheed Martin*); see *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 463 (*City of San Jose*) ["Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability"].)

Thus, even in a case involving a written form contract, the Court of Appeal has recognized that the mere existence of such a "form contract is *insufficient* to determine that common issues predominate when the questions of breach and damage are essentially individual." (*Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 732 (*Thompson*), emphasis

added; see also *Lopez, supra,* 217 Cal.App.4th at p. 1127 [trial court properly denied class certification where evidence did not show "a specific policy or practice that uniformly was applied"]; *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 997 (*Dailey*) [trial court properly denied class certification based on defendant's "substantial evidence disputing the uniform application of its business policies and practices, and showing a wide variation in proposed class members' job duties"]; *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1364 (*Morgan*) [trial court properly denied class certification because, " 'in order to answer the central questions on liability, one has to look beyond the written policy to the practices employed by each manager at each of the 74 retail stores' "].)

B. Plaintiffs did not meet their burden of showing the uniform application of a common policy.

Here, plaintiffs did not meet their burden of satisfying the prerequisites for class treatment because they could not show that questions of law or fact common to the class members predominated over the individual issues.

As an initial matter, the trial court wrongly determined that an employer fails to provide a lawful rest break if its employees merely carry a radio and thus could potentially be called back to work in an emergency. As defendant has persuasively explained, it cannot be possible that all on-call paid rest breaks are legally invalid based solely on this one consideration given the requirement

that, in determining whether on-call time is compensable at all, courts must apply a fact-specific, multifactor analysis. (ARB 9-10.) That "nonexclusive list of factors" includes " 'whether the employee had actually engaged in personal activities during call-in time,' " " 'whether the frequency of calls was unduly restrictive,' " and " 'whether use of a pager could ease restrictions.' " (*Gomez, supra,* 173 Cal.App.4th at p. 523.) That the propriety of compensating a class member for on-call paid rest breaks hinges on a fact-intensive inquiry alone demonstrates that this action is not susceptible to class treatment because of the predominance of individualized issues. (See *City of San Jose, supra,* 12 Cal.3d at p. 460 [" ' "a group of individuals' rights to recover, each of which is based on a separate set of facts, cannot be determined by a judgment in a class action" ' "].)

Moreover, the trial court ignored evidence demonstrating the predominance of individualized issues under this multifactor test, including "that interruptions are so rare that [ABM's] guards [were] effectively getting their breaks." (13 JA 3757.) For example, defendant's actual rest break policy "authorize[d] and permit[ted] employee[s] to take [their] paid, 10 minute rest break[s] as required by California law." (9 JA 2418; see AOB 41, ARB 23.) Manager Fred Setayesh testified that the nature of the rest breaks defendant provided "may vary from scenario to scenario," "vary from the time frame of the day," and "vary from the location." (11 JA 3101; see AOB 44, ARB 28.) And regional vice-president Glenn Gilmore testified that the rest break policies "depend[ ] on the kind of location we are servicing, because we don't operate the exact same

way." (6 JA 1570; see AOB 40, ARB 27.) Nonetheless, the trial court ignored these differences and even concluded "it is *irrelevant* that an employee may read or engage in other personal activities during 'down time.' " (13 JA 3760, emphasis added.)

But for the trial court's misapplication of the multifactor test for determining whether on-call time is compensable, resolution of the claims on a classwide basis would have been unmanageable, necessitating inquiries regarding over 14,000 individual class members at different worksites and under different circumstances. Indeed, whether or not plaintiffs were correct about the substantive law, this individualized evidence would have rendered any class certification inappropriate, because the question whether employees were required to take on-duty breaks would not have generated common answers but instead answers that would have varied from employee to employee.

Citing *Brinker*, plaintiffs suggest that allegations of a uniform policy, divorced from the evidence, can still justify class certification. (RB 39.) But *Brinker* holds otherwise. In deciding the issue of predominance, "[a] court must examine the allegations of the complaint and *supporting declarations* [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible." (*Brinker*, *supra*, 53 Cal.4th at pp. 1021-1022, emphasis added; see also *Soderstedt*, *supra*, 197 Cal.App.4th at pp. 154, 158 [affirming order denying class certification; "pleadings are allegations, not evidence, and do not suffice to satisfy a party's evidentiary burden"].) *Brinker* thus held that class certification is

impermissible when liability must be established "employee-by-employee." (*Brinker*, at p. 1052.)

As the Seventh Circuit recently explained, "Mere *assertion* by class counsel that common issues predominate is not enough. That would be too facile. Certification would be virtually automatic." (*Parko v. Shell Oil Co.* (7th Cir. 2014) 739 F.3d 1083, 1085 (Posner, J.) (*Parko*).) In *Parko*, the trial court "treated predominance as a pleading requirement," finding it sufficient that plaintiffs *intended* to rely on common evidence. (*Id.* at p. 1086.) "But if intentions (hopes, in other words) were enough, predominance, as a check on casting lawsuits in the class action mold, would be out the window. Nothing is simpler than to make an unsubstantiated allegation." (*Ibid.*)[2]

Furthermore, plaintiffs' suggestion that class certification is appropriate based on the mere assertion of a uniform policy cannot be squared with the California Supreme Court's recognition that the propriety of class treatment in a wage and hour case depends on whether a "uniform policy [was] consistently *applied* to a group of employees." (*Brinker*, *supra*, 53 Cal.4th at p. 1033, emphasis

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[2] *Parko* and other cases involving federal class procedure are informative, as California courts regularly look to federal class action decisions for guidance. (See *Brinker*, *supra*, 53 Cal.4th at p. 1021 ["Drawing on the language of Code of Civil Procedure section 382 and *federal precedent*, we have articulated clear requirements for the certification of a class" (emphasis added)]; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 318 [the federal class action requirements "are analogous to the requirements for class certification under Code of Civil Procedure section 382"]; *Fireside Bank*, *supra*, 40 Cal.4th at p. 1090; *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844.)

added.) Thus, even had plaintiffs presented actual evidence of a uniform policy, class certification would remain improper because the purported violation of the wage and hour laws involves a nonuniform application of the policy. (*Ante*, pp. 12-16; accord, e.g., *Cummings v. Starbucks Corp.* (C.D.Cal., Mar. 24, 2014, No. CV 12-06345-MWF (FFMx)) 2014 WL 1379119, at pp. *21-*23 [nonpub. opn.] [refusing to certify a rest break class based only on a facially defective rest break policy because the evidence did not establish that employer's defective policy "was consistently applied to deprive class members" of rest breaks and it would be an abuse of discretion to certify such a class based "on the defective rest period policy to the exclusion of other evidence in the record"].)

II. INDIVIDUALIZED ISSUES CONCERNING THE RIGHT TO RECOVER PRECLUDE CLASS CERTIFICATION.

A. The right to recover is an issue of liability.

Plaintiffs rely on decisions applying the general rule that individualized damages issues do not ordinarily bar class certification. (*Brinker*, *supra*, 53 Cal.4th at p. 1022; RB 39-40.) But the *right to recover* is not a damages issue, it is an issue of *liability*.[3]

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[3] At any rate, as discussed below, this general rule concerning the impact of individualized damages issues can no longer be considered good law in light of recent United States Supreme Court decisions confirming a defendant's constitutional due process right to litigate its individual defenses. (At pp. 41-43, *post*.)

Individuality regarding the right to recover precludes class certification. "[A] class action cannot be maintained where each member's *right to recover* depends on facts peculiar to his case . . . . The rule exists because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the 'class judgment' determining issues common to the purported class." (*City of San Jose, supra,* 12 Cal.3d at p. 459, emphasis added; see *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 424 (*Fuhrman*) [where " 'each member of the class will be required to litigate numerous and substantial issues affecting his individual right to recover damages after the common questions have been determined, the requirement of community of interest is not satisfied' "], disapproved on another ground in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212-213.)

The California Supreme Court and Courts of Appeal have repeatedly reversed or vacated class certification orders when individuality regarding the right to recover prevented commonality. (See, e.g., *Lockheed Martin, supra,* 29 Cal.4th at p. 1111 ["The questions respecting each individual class member's right to recover that would remain following any class judgment appear so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified on such a basis advantageous to the judicial process and the litigants"]; *City of San Jose, supra,* 12 Cal.3d at p. 463; *Thompson, supra,* 217 Cal.App.4th at p. 732

[individual issues predominated over common issues when some class members might have been better off under the challenged policy: "These are not merely issues relating to the measure of damages, but as to whether any possible recovery exists"]; *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 756 [rejecting plaintiff's argument that individuality concerned only damages; "the individual issues here go beyond mere calculation; they involve each class member's *entitlement* to damages"].)

Here, the individualized issues bore on substantive liability and had to be resolved for each individual class member before reaching the question of the amount of damages that any individual could recover. These were not damages issues. (*Morgan, supra,* 210 Cal.App.4th at p. 1369 [distinguishing between "determinations regarding the 'extent of liability,' " and "more fundamentally . . . *the fact* of liability"]; *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 42 [contrasting right to recover and "mere variations in the measure of damages"].) The trial court thus abused its discretion by certifying the class despite the predominance of individual issues concerning the right to recover.

B. Plaintiffs' authorities address class certification despite individuality in damages issues, not individuality in *liability* issues here.

Plaintiffs rely on two post-*Brinker* cases allowing class certification despite individuality in damages issues. But neither case addresses individuality in liability issues, such as exists here.

Plaintiffs cite *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 224-225 (*Faulkinbury*), in which the Court of Appeal reversed an order denying certification on meal and rest period claims. (RB 39-40.) But that case involved individuality in damages issues, not liability issues. There, the fact of a universal policy and practice was not contested as defendant served discovery responses *denying* that its employees took any off-duty meal breaks. (*Faulkinbury,* at pp. 234-235.) In short, the defendant did not dispute it had an on-duty meal break policy that "was *uniformly and consistently applied* to all security guard employees." (*Id.* at p. 233, emphasis added.) Consequently, any individuality concerned only damages. (*Id.* at p. 237.) Because *Faulkinbury* addressed a uniform and commonly applied employment policy, it is not authority for class certification despite individuality in the liability issues here.

Plaintiffs' reliance on *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701 (*Benton*) is equally misplaced. (RB 40.) *Benton* concerned an employer's uniform failure to authorize meal and rest breaks. The Court of Appeal declined even to consider defendant's argument that "it did not uniformly lack a policy of authorizing and permitting meal and rest periods . . . . [¶] . . . because the trial court did not address or rely on these arguments." (*Benton*, at p. 727.) " 'It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court.' " (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.)

In contrast to the cases on which plaintiffs rely, the issue of liability here would have required unmanageable individualized inquiries because plaintiffs did not show a uniform and consistent policy supporting their claims. Whether class members effectively received rest breaks varied widely. (6 JA 1570; 11 JA 3101.) Moreover, numerous class members were uninjured. For example, class members Jesse Wright, Johan Nowack, and Stephen Powell all testified they were never called back to work during a break. (23 JA 6779; 24 JA 6806, 6828.) And even the trial court recognized that another class member "testified [at his deposition] that he did not carry a radio on certain 'breaks.' " (MJN, Evangelis Decl., exh. A, p. 2.) The questions whether class members had a right to recover for any missed rest breaks were inherently factual questions of liability rather than damages.

In short, it would be improper to extend the holdings of *Faulkinbury* and *Benton* beyond their facts to allow certification despite individualized issues concerning the right to recover. Indeed, any such extension would conflict with the California Supreme Court's opinions in *Lockheed Martin* and *City of San Jose* establishing that the right to recover is a liability issue and that individuality regarding that right bars class certification. (See *ante*, pp. 20-22.)

C. Individuality in damages issues can also show the absence of commonality.

The general rule that individualized damages issues do not ordinarily bar class certification is simply another way of stating the unremarkable proposition that such issues do not bar class certification where other common issues predominate over those individual issues. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334-335 [although individualized proof of damages "is not per se an obstacle to class treatment," such proof can present an obstacle if those issues cannot "effectively be managed"].)

Indeed, in one of the first California Supreme Court opinions to examine the interplay between individualized damages issues and class certification, the Court emphasized that "[t]he fact that each individual ultimately must prove his separate claim to a portion of any recovery by the class" is a "factor to be considered in determining whether a class action is proper"—albeit only "one factor." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713.)

Accordingly, the Courts of Appeal have long recognized that "the determination of each class member's damages can be so diverse that there does not exist a community of interest in common questions of law and fact." (*Altman v. Manhattan Savings Bank* (1978) 83 Cal.App.3d 761, 766.) California courts have therefore held that class treatment is sometimes inappropriate where individualized damages issues predominate over questions common

to the class. (See, e.g., *id.* at pp. 766-769; *Fuhrman, supra,* 179 Cal.App.3d at pp. 424-425.)

The general rule allowing individual proof of damages in a class action "has been applied most frequently where computation of individual damages is 'a relatively uncomplicated problem.' " (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 657, quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238; see also *Steering Committee v. Exxon Mobil Corp.* (5th Cir. 2006) 461 F.3d 598, 602 ["where individual damages cannot be determined by reference to a mathematical or formulaic calculation, the damages issue may predominate over any common issues shared by the class"]; *Bell Atlantic Corp. v. AT&T Corp.* (5th Cir. 2003) 339 F.3d 294, 306-307; *Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 342-343; *Windham v. American Brands, Inc.* (4th Cir. 1977) 565 F.2d 59, 68 ["where the issue of damages and impact does not lend itself to . . . a mechanical calculation, but requires 'separate "mini-trial"[s]' of an overwhelming large number of individual claims, courts have found that the 'staggering problems of logistics' thus created 'make the damage aspect of [the] case predominate,' and render the case unmanageable as a class action" (fns. omitted)].)

Here, the computation of individual damages for the over 14,000 individual class members would be anything but uncomplicated if it properly took into account the work at different sites and under different circumstances as required under the multifactor test that the trial court misapplied. (See, *ante* pp. 16-18, 24.) Tellingly, the trial court even disregarded evidence showing

that uninjured class members would receive damages for rest breaks they never actually missed. (See 23 JA 6779; 24 JA 6806, 6828.) Particularly when viewed in the context of individuality regarding the right to recover at all, the complicated and numerous individual damages issues preclude class certification. (See, e.,g., *In re Principal U.S. Property Account ERISA Litigation* (S.D. Iowa, Sept. 30, 2013, No. 4:10-cv-00198-JEG) 2013 WL 7218827, at pp. *35-*36 [nonpub. opn.] [where individualized damages issues are tied to individualized liability issues, "individualized analyses permeate the case" and predominate over common questions].)

III. THE CERTIFICATION OF A CLASS HERE VIOLATES DEFENDANT'S DUE PROCESS RIGHTS.

A. Defendant has a due process right to be heard and to present every available defense to class actions.

The United States and California Constitutions guarantee the right to due process. (U.S. Const., 14th Amend., § 1 [no state shall "deprive any person of life, liberty, or property, without due process of law"]; Cal. Const., art. I, §§ 7, 15 [no person shall be "deprived of life, liberty, or property without due process of law"].)

Fundamental to the due process right " 'is the opportunity to be heard.' " (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267 [90 S.Ct. 1011, 25 L.Ed.2d 287], quoting *Grannis v. Ordean* (1914) 234 U.S. 385, 394 [34 S.Ct. 779, 58 L.Ed. 1363].) Due process requires a

"meaningful opportunity to be heard and to explain one's actions." (*People v. Coleman* (1975) 13 Cal.3d 867, 873.)

Before a defendant can be deprived of property, due process thus requires the defendant be afforded " 'an opportunity to present *every available defense.*' " (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 [127 S.Ct. 1057, 166 L.Ed.2d 940], emphasis added, quoting *Lindsey v. Normet* (1972) 405 U.S. 56, 66 [92 S.Ct. 862, 31 L.Ed.2d 36] (*Lindsey*).) This principle has long been recognized. (See, e.g., *United States v. Armour & Co.* (1971) 402 U.S. 673, 682 [91 S.Ct. 1752, 29 L.Ed.2d 256] [the "right to litigate the issues raised [is] . . . guaranteed . . . by the Due Process Clause"]; *Nickey v. State of Mississippi* (1934) 292 U.S. 393, 396 [54 S.Ct. 743, 78 L.Ed. 1323] [due process satisfied when "all available defenses may be presented to a competent tribunal"].)

The California Supreme Court has described class actions under California law as strictly procedural devices. "Class actions are provided only as a means to enforce substantive law." (*City of San Jose, supra,* 12 Cal.3d at p. 462; *In re Tobacco II Cases, supra,* 46 Cal.4th at p. 313 [a class action "does not change . . . substantive law"]; accord, *Deposit Guaranty Nat. Bank, Etc. v. Roper* (1980) 445 U.S. 326, 332 [100 S.Ct. 1166, 63 L.Ed.2d 427] [the right to proceed as a class is "a procedural right only, ancillary to the litigation of substantive claims"].)

Because a California class action is a purely procedural device, courts cannot use class treatment to alter the substance of a party's rights or liabilities. As the California Supreme Court held in *City of San Jose,* "Altering the substantive law to accommodate

[class] procedure would be to confuse the means with the ends—to sacrifice the goal for the going." (*City of San Jose, supra,* 12 Cal.3d at p. 462; accord, *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749 ["it is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen"]; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1014 ["Class certification does not serve to enlarge substantive rights or remedies"].)

Federal law is no different. The federal class action device does no more than provide "the procedural means by which [a] remedy may be pursued." (*Shady Grove Orthopedic Associates v. Allstate Ins.* (2010) 559 U.S. 393, 402 [130 S.Ct. 1431, 176 L.Ed.2d 311] (*Shady Grove*).) This device "leaves the parties' legal rights and duties intact and the rules of decision unchanged." (*Id.* at p. 408 (plur. opn. of Scalia, J.); see *Sikes v. Teleline, Inc.* (11th Cir. 2002) 281 F.3d 1350, 1365 ["class treatment may not serve to lessen the plaintiffs' burden of proof"], abrogated on another ground in *Bridge v. Phoenix Bond & Indem. Co.* (2008) 553 U.S. 639 [128 S.Ct. 2131, 170 L.Ed.2d 1012].)

Even if the class action device in California could be used by courts to alter substantive law, it certainly could not be used to deprive a litigant of constitutional protections. The due process right to present every available defense applies fully in a class action lawsuit. Although "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," it is well

settled "that extreme applications" of this principle "may be inconsistent with a federal right that is 'fundamental in character.' " (*Richards v. Jefferson County, Ala.* (1996) 517 U.S. 793, 797 [116 S.Ct. 1761, 135 L.Ed.2d 76], quoting *Postal Telegraph Cable Co. v. City of Newport, K.Y.* (1918) 247 U.S. 464, 476 [38 S.Ct. 566, 62 L.Ed. 1215]; e.g., *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 16 [recognizing defendant's due process right in class action context].) Class actions may " 'achieve economies of time, effort, and expense,' " but only when those goals can be achieved " 'without sacrificing procedural fairness or bringing about other undesirable results.' " (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 615 [117 S.Ct. 2231, 138 L.Ed.2d 689], quoting Advisory Com. Notes, 28 U.S.C. Appen., p. 697.)

When a state "abrogat[es] a well-established common-law protection," it creates "a presumption that its procedures violate the Due Process Clause." (*Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 430 [114 S.Ct. 2331, 129 L.Ed.2d 336].) Of course, the due process right does not prohibit all changes to established procedure. (*Ibid.*) But, as explained below, in light of the significant variations in the nature of the rest breaks that defendant provided its employees here, the grant of class certification violated due process by altering substantive law to abrogate defendant's fundamental right to defend itself through the presentation of individual defenses to liability and damages.

B. Class certification here violated defendant's due process right to litigate individualized defenses.

1. The certification of a class in this case violated the due process prohibition against trials by formula.

The trial court here granted both class certification and classwide summary judgment without any individualized analysis, despite the overwhelming evidence showing that defendant's rest break policies were not common and not uniformly applied. As defendant has aptly argued, and as further explained below, the class certification was thus even worse than the trial by formula rejected in *Wal-Mart*. (AOB 59-60.)

In *Wal-Mart*—cited with approval in other respects in *Brinker*—the United States Supreme Court relied on the core principles of a right to a defense in rejecting a "Trial by Formula" that deprives defendants of their right to litigate defenses to the individual claims of class members. (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2561; see *Brinker*, *supra*, 53 Cal.4th at p. 1023.) In that case, the Ninth Circuit affirmed the district court's class certification on the assumption that statistical sampling could be used to decide the defenses to individual claims. Thus, the claims of a sample set of class members were to be tried, and the results of those trials were to be applied to the remaining class without further individualized proceedings. (*Wal-Mart*, at p. 2561.) The Supreme Court "*disapprove[d] that novel project*" because "a class cannot be

certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." (*Ibid.*, emphasis added.)[4]

Wal-Mart thus reversed class certification on the ground that a federal class action cannot " 'abridge, enlarge or modify any substantive right.' " (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2561, quoting 28 U.S.C. § 2072(b).) *Wal-Mart* applies with equal force here, because under federal law, as under California law, class actions are procedural devices that cannot modify substantive rights. (See, e.g., *In re Tobacco II Cases*, *supra*, 46 Cal.4th at p. 313; *City of San Jose*, *supra*, 12 Cal.3d at p. 462 & fn. 9; *Shady Grove*, *supra*, 559 U.S. at pp. 408-409.)

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[4] Before *Wal-Mart*, class action jurisprudence "relie[d] heavily on statistical sampling," as the "seduction of procedural efficiency . . . masked a mad rush to certify the greatest number of litigants possible, while also generating profitable business for class action lawyers." (Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation* (2012) 44 Loy. U. Chi. L.J. 467, 468-469, fn. omitted.) Statistical sampling permits plaintiffs to "extract[ ]" the results of sampling "from a small subset" of individuals and "apply[ ] them to a much larger universe" of individuals without allowing "the defendant a reciprocal opportunity to defend against each absent class member." (*Id.* at pp. 497-499.) Moreover, the use of statistical sampling methodology in modern class actions generates "a false sense of precision" but "is subject to the vagaries of the statistical determination process" and is therefore "highly susceptible to error." (*Id.* at pp. 507-509.) Simply put, for a time, "statistical sampling ha[d] taken primacy over due process." (*Id.* at p. 469.) But *Wal-Mart* "rightfully corrected this awry course," reining in "the unbridled use of statistics in class action litigation." (*Id.* at pp. 507-509.)

Notably, numerous courts have found due process violations based on the misuse of representative evidence. The Fifth Circuit applied due process principles when rejecting a class action trial plan that would have allowed the claims of all class members to be decided based on a trial of representative claims. (*In re Fibreboard Corp.* (5th Cir. 1990) 893 F.2d 706, 711 (*In re Fibreboard*).) Under the trial plan in that case, the defendants were "exposed to liability not only in 41 cases actually tried with success to the jury, but in 2,990 additional cases whose claims [were] indexed to those tried." (*Ibid.*) The Fifth Circuit held this plan eliminated "the requirement that a plaintiff prove both causation and damage" and, by doing so, "inevitably restate[d] the dimensions of tort liability." (*Ibid.*)

Other decisions are in accord in recognizing that the fundamental due process right to present all defenses to liability cannot be impinged. (See, e.g., *Carrera v. Bayer Corp.* (3d Cir. 2013) 727 F.3d 300, 307 (*Carrera*) ["A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues"]; *McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215, 232 [" 'defendants have the right to raise individual defenses against each class member' "] quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith* (3d Cir. 2001) 259 F.3d 154, 191-192 (*Newton*); *In re Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 853 ["The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause

not be lost in the shadow of a towering mass litigation"]; *Western Elec. Co., Inc. v. Stern* (3d Cir. 1976) 544 F.2d 1196, 1199 [trial court abused its discretion by denying defendants the right to obtain discovery on the claims of the individual class members; "to deny [defendants] the right to present a full defense on the issues would violate due process"]; *Stonebridge Life Ins. Co. v. Pitts* (Tex. 2007) 236 S.W.3d 201, 205 [due process requires that class actions not be used to diminish the substantive rights of any party to the litigation]; *Southwestern Refining Co., Inc. v. Bernal* (Tex. 2000) 22 S.W.3d 425, 437 (*Southwest Refining Co.*) ["basic to the right to a fair trial—indeed, basic to the very essence of the adversarial process—is that each party have the opportunity to adequately and vigorously present any material claims and defenses"].)

Here, given that plaintiffs' claims required highly individualized inquiries into the circumstances of each class member (*ante*, pp. 16-18, 24), the defendant's policies were not uniform and not commonly applied, (*ante*, pp. 16-18), and numerous class members were uninjured (*ante*, p. 24), it is inevitable that the class claims could have been tried only through the use of the trial by formula methodology rejected by *Wal-Mart*. This is so because, where (as here) a plaintiff has not demonstrated that all class members' wage and hour rights were uniformly affected in the same way by a uniform policy, liability and damages can be established only through the improper use of a trial by formula that fails to account for whether some class members, due to variations in circumstances, did not actually experience the wage and hour violations that other class members may have encountered due to a

company's policy. (See *Stiller v. Costco Wholesale Corp.* (S.D.Cal., Apr. 15, 2014, No. 3:09-cv-2473-GPC-BGS) ___ F.R.D. ___ [2014 WL 1455440, at pp. *16-*19] (*Stiller*).)

Furthermore, the due process violation here was even more manifest than in cases like *Wal-Mart* where lower courts have improperly permitted plaintiffs to use a trial by formula to deprive defendants of their right to litigate individualized defenses. In a trial by formula, where plaintiffs rely on statistical sampling to extrapolate the fruits of the representative testimony of a small subset of individuals to the larger universe of the entire class, a defendant at least receives the opportunity to marshal defenses based on this representative evidence. (See *Wal-Mart*, *supra*, 131 S.Ct. at pp. 2560-2561 [trial by formula permits litigation to determine liability and damages based on sample set of representative evidence].) As explained earlier, the trial court here misapplied a fact-specific, multifactor analysis that would have required unmanageable individualized inquiries, and further ignored significant variations as to whether individual class members were effectively permitted to take off duty rest breaks. Despite these divergent and highly individualized experiences, the trial court certified a class of over 14,000 members, and even awarded nearly $90 million in damages without holding a trial.

Thus, far exceeding the impropriety of merely restricting a defendant's right to litigate individualized defenses to a narrow representative sample of class members, the trial court deprived defendant of its right to present *any* individual defenses to members' claims—erroneously granting class certification and

summary judgment without any individualized analysis, notwithstanding the evidence showing that defendant's rest break policies were not common and not uniformly applied. (See AOB 59-60.) Courts cannot grant class certification where doing so would "eviscerate[ ]" a defendant's "due process right to raise individual challenges and defenses to claims." (*Carrera, supra,* 727 F.3d at p. 307.)

In short, the type of trial by formula that would be necessary here, like the trial by formula rejected in *Wal-Mart,* must fail. The class claims could have proceeded to trial only by using a standard that was substantively different from the one required by law—the use of statistical sampling, extrapolation, or other impermissible shortcuts to establish class liability after the defendant presented evidence supporting individual defenses to liability. The effect would have been "that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." (*Philip Morris USA Inc. v. Scott* (2010) 561 U.S. ___ [131 S.Ct. 1, 4, 177 L.Ed.2d 1040]; see also *Comcast, supra,* 133 S.Ct. at p. 1433 [trial court erred by accepting damages model in class action that was not limited to the antitrust theory of anticompetitive impact at issue]; *Southwestern Refining Co., supra,* 22 S.W.3d at p. 437 ["With the help of models, formulas, extrapolation, and damage brochures, plaintiffs may indeed be able to present their case in an expeditious manner. . . . But, while [defendant] may not be entitled to separate trials, it is entitled to challenge the credibility of and its responsibility for each personal injury claim individually."].)

2. *Wal-Mart*'s limitation on trials by formula applies in both federal and state court class actions.

"That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice." (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1366.) Such fairness cannot be reconciled with the use of statistical sampling to preclude evidence showing defenses to the claims of individual class members. The businesses and organizations whose interests amici represent are frequently targets of class action lawsuits. Both fairness and due process dictate that they be afforded the right to defend the claims against them.

When California and federal class procedures are similar, as they are on this point, federal authorities such as *Wal-Mart* are highly persuasive. (See *Southern California Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 839 [noting the court's reliance in the class action context on "federal case law, in the absence of controlling California authority"]; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 ["we have previously suggested that trial courts, in the absence of controlling California authority, utilize the class action procedures of the federal rules"]; *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1119, fn. 4, [" ' "California courts may look to federal authority for guidance on matters involving class action procedures" ' "], quoting *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264, fn. 4; *Danzig v. Superior Court* (1978) 87 Cal.App.3d 604, 610

["Where, as here, there is no controlling California authority in a class action and the California procedural rule involved is identical to the corresponding federal rule, federal cases construing the rule are particularly persuasive authority"].)

Indeed, not only is *Wal-Mart* persuasive authority here, state courts are *bound* by *Wal-Mart*'s disapproval of the use of trials by formula to sidestep a defendant's substantive right to litigate the individual issues arising in a class action. Although the *Wal-Mart* court centered its decision on the Rules Enabling Act (*Wal-Mart, supra,* 131 S.Ct. at p. 2561), such class action procedural "protections [are] grounded in due process" (*Taylor v. Sturgell* (2008) 553 U.S. 880, 901 [128 S.Ct. 2161, 171 L.Ed.2d 155]). This is why courts have found that, under *Wal-Mart*, "due process impels that a defendant have the opportunity to respond" to individualized issues in class actions. (*Jacob v. Duane Reade, Inc.* (S.D.N.Y. 2013) 293 F.R.D. 578, 589 (*Jacob*).) California law must comply with the due process protections afforded by the United States Constitution. (See *Perry v. Thomas* (1987) 482 U.S. 483, 491 [107 S.Ct. 2520, 96 L.Ed.2d 426] [under United States Constitution's Supremacy Clause, California law must "give way"]; see also *City of Boerne v. Flores* (1997) 521 U.S. 507, 529 [117 S.Ct. 2157, 138 L.Ed.2d 624] [United States Constitution is the " 'superior paramount law' "].)

Nonetheless, Division Eight of the Second District Court of Appeal recently concluded that *Wal-Mart* could be limited to its procedural facts involving claims for alleged discrimination under Title VII and injunctive relief under Federal Rules of Civil Procedure, rule 23(b)(2). (*Williams v. Superior Court* (2013)

221 Cal.App.4th 1353, 1363-1364 (*Williams*).) But the United States and California Supreme Courts have declined the invitation to so confine *Wal-Mart*. (*Comcast*, *supra*, 133 S.Ct. at p. 1433 [applying *Wal-Mart* in antitrust damages action under Rule 23(b)(3)]; *Brinker*, *supra*, 53 Cal.4th at p. 1023 [applying *Wal-Mart* in wage and hour damages action under state law]; see also, e.g., *City of San Diego*, *supra*, 207 Cal.App.4th at p. 501 [applying *Wal-Mart* in employee benefits declaratory relief action under state law]; *Wang v. Chinese Daily News, Inc.* (9th Cir. 2013) 737 F.3d 538, 542, 544-546 [applying *Wal-Mart* in Fair Labor Standards Act case under both Rules 23(b)(2) and (b)(3)]; *Gonzalez v. Millard Mall Services, Inc.* (S.D.Cal. 2012) 281 F.R.D. 455, 460-461 [applying *Wal-Mart* in wage and hour damages action under Rule 23(b)(3)].) On this point, *Williams* is simply mistaken.

The *Williams* court also misconstrued *Wal-Mart* as narrowly concerning only the *calculation* of damages and mistakenly stated that such calculations "have little, if any, relevance at the certification stage." (*Williams*, *supra*, 221 Cal.App.4th at p. 1365.) In fact, *Wal-Mart* condemned a trial by formula on the fundamental ground that it would deny the defendant its substantive right to presents its "defenses to [the plaintiffs'] individual claims." (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2561.) And the use of statistical sampling here would also deprive defendant of that fundamental right.

Additionally, *Williams* mistakenly suggests that California class action law differs in material respects from the federal class action law at issue in *Wal-Mart*. (*Williams*, *supra*, 221 Cal.App.4th

at pp. 1361-1364.) *Wal-Mart* disapproved the misuse of statistical sampling in class actions because, under the Rules Enabling Act, a class device cannot abridge or otherwise modify a substantive right. (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2561.) The same is equally true under California class action law. (See *In re Tobacco II Cases*, *supra*, 46 Cal.4th at p. 313; *City of San Jose*, *supra*, 12 Cal.3d at p. 462.) Nor could California courts adopt a contrary rule as a matter of state law because, as previously explained, constitutional due process "prevents the use of class actions from abridging the substantive rights of any party." (*Sacred Heart Health v. Humana Military Healthcare* (11th Cir. 2010) 601 F.3d 1159, 1176; see *ante*, pp. 27-30.)

Moreover, the United States Supreme Court has applied *Wal-Mart* in assessing whether common issues predominate in federal class actions (see *Comcast*, *supra*, 133 S.Ct. at p. 1433), and the same predominance requirement applies with equal force under California law (see *Brinker*, *supra*, 53 Cal.4th at p. 1021). In fact, the requirements for class treatment under California law are "[d]raw[n]" from "federal precedent" and the California Supreme Court has relied on *Wal-Mart* in assessing predominance. (*Id.* at pp. 1021, 1023.) There is no material difference between California law and the legal principles on which *Wal-Mart* relied to reject the improper use of a trial by formula.

To sum up, under both federal and California law statistical sampling is not an appropriate means of managing the individual issues when sampling would allow liability to be extrapolated in a way that would abrogate the defendant's right to prove it was not

liable to at least some of the class members. (See *Stiller*, *supra*, ___ F.R.D. ___ [2014 WL 1455440, at p. *16] [refusing to certify wage and hour class action where "liability cannot be proved on a classwide basis" without an improper trial by formula that would "thwart[ ]" employer's "ability to demonstrate that some class members, due to a variety of circumstances, did not actually experience" uncompensated violations of wage and hour law "despite being subject" to an allegedly uniform and purportedly unlawful policy].) Such use of statistical sampling allows class action procedure to alter the defendant's substantive right—and represents the very trial by formula *Wal-Mart* rejected.[5]

C. A trial by formula ostensibly limited to damages would also violate due process.

Plaintiffs mistakenly suggest that individual issues of damages cannot preclude class certification. (RB 40.) But as the United States Supreme Court held in *Comcast*, "questions of individual *damage calculations*" may "overwhelm questions common to the class" and prevent a finding of predominance. (*Comcast*, *supra*, 133 S.Ct. at p. 1433, emphasis added.) Thus, even beyond

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[5] If anything, there is significant doubt about whether statistical sampling can *ever* be used to establish class liability without violating due process. (See *Dailey*, *supra*, 214 Cal.App.4th at p. 998, fn. 10.) "Whether the use of sampling methodologies to prove liability" in a class action "consistent with due process is now before the California Supreme Court in *Duran v. U.S. Bank National Assn.* [, review granted May 16, 2012, S200923]." (*Ibid.*) The Supreme Court heard oral argument in that matter on March 4, 2014.

the liability issues here, such disparate treatment of individualized damages may also deprive parties of their due process rights. *Comcast*, understood in the context of *Wal-Mart*, "instructs courts that the method by which . . . damages are calculated may not serve as an afterthought in the class certification analysis, as whenever damages calculations require significant degrees of individualized proof, defendants are entitled to respond to and address such variances—in fact, due process requires it." (*Jacob*, *supra*, 293 F.R.D. at p. 592.)

Comcast and *Wal-Mart*, when read "together," set "due process implications for defendants" in damages class actions that "render the so-called 'trial by formula' approach, whereby representative testimony is utilized to determine damages for an entire class, inappropriate where individualized issues of proof overwhelm damages calculations." (*Jacob*, *supra*, 293 F.R.D. at p. 588; see also *Stone v. Advance America* (S.D.Cal. 2011) 278 F.R.D. 562, 566, fn. 1 [*Wal-Mart* "largely eliminates a 'trial by formula' approach to use statistics to extrapolate average damages for an entire class" where "an individualized defense" is at issue].) These due process concerns, compelled by the individualized damages issues here, further show the trial court's error in certifying the class.

To the extent that, before *Wal-Mart* and *Comcast*, California courts ever followed a general rule of thumb that deemed individualized damages issues not to preclude class certification, that rule can no longer be considered viable in light of the intervening *Wal-Mart* and *Comcast* decisions. (See *Stiller*, *supra*,

___ F.R.D. ___ [2014 WL 1455440, at p. *16] ["*Comcast* makes clear that individualized damages determinations can defeat" the "predominance requirement" for class certification and therefore abrogates prior intermediate appellate court decisions holding such individualized damages issues cannot defeat class certification]; see also *Slapikas v. First American Title Ins. Co.* (W.D.Pa., Mar. 7, 2014, No. 06-0084) ___ F.R.D. ___ [2014 WL 899355, at p. *15] ["[i]ndividualized fact finding . . . to determine damages across the class" is "incompatible with *Comcast*'s requirement that plaintiffs provide a system of finding damages that does not include individual fact finding"]; *Franco v. Connecticut General Life Ins. Co.* (D.N.J., Apr. 14, 2014, No. 07-6039 (SRC)) ___ F.Supp.2d ___ [2014 WL 1415949, at p. *11] [under *Comcast*, class certification cannot be granted unless plaintiffs "establish, by a preponderance of the evidence, that the injury suffered by class members is measureable on a classwide basis using common proof"]; *Bruce v. Teleflora, LLC* (C.D.Cal., Dec. 18, 2013, No. 2:13-cv-03279-ODW(CWx)) [2013 WL 6709939, at p. *6] [nonpub. opn.] [under *Comcast*, "damages must be 'capable of measurement on a classwide basis' to establish predominance" because, "[o]therwise, questions of 'individual damages calculations will inevitably overwhelm questions common to the class' "].)

As previously noted, *Wal-Mart* and *Comcast*'s prohibition on the misuse of statistical sampling reflect limitations imposed by constitutional due process guarantees. (*Ante*, pp. 31-36.) Any contrary state law rule must therefore give way under the United States Constitution.

D. If allowed, a trial by formula would unfairly pressure defendants to settle class actions and burden the state's economy.

The trial court's certification of a class of over 14,000 members, combined with its award of nearly $90 million in damages, provides a stark illustration regarding how the threat of a trial by formula can unfairly pressure a defendant to settle the class claims against it.

Even without the use of a trial by formula, the certification of a large class may "so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." (*Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 476 [98 S.Ct. 2454, 57 L.Ed.2d 351].) The very fact of certification gives a class action plaintiff enormous leverage in settlement negotiations; lower courts have variously described the pressure on defendants to settle in the wake of certification decisions as "inordinate," "hydraulic," and "intense." (See *Newton, supra*, 259 F.3d at p. 164; *Matter of Rhone-Poulenc Rorer Inc.* (7th Cir. 1995) 51 F.3d 1293, 1298; see also Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA* (2006) 106 Colum. L.Rev. 1872, 1875 ["Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements"].) Judge Friendly aptly labeled "settlements induced by a small probability

of an immense judgment in a class action 'blackmail settlements.' " (*Rhone-Poulenc*, at p. 1298, quoting Friendly, Federal Jurisdiction: A General View (1973) p. 120.)

This leverage will increase exponentially if statistical sampling is permitted to preclude the defendant from showing individual defenses to the claims of individual class members. Such a trial by formula would "inevitably restate[ ] the dimensions of tort liability." (*In re Fibreboard*, *supra*, 893 F.2d at p. 711.) By violating the defendant's fundamental right to present every defense (see *Lindsey*, *supra*, 405 U.S. at p. 66), the trial by formula would in most cases coerce the only rational alternative—settlement.

The costs of settling such actions would not fall exclusively on individual defendants; they would impose a drag on this state's economy. "No one sophisticated about markets believes that multiplying liability is free of cost." (*S.E.C. v. Tambone* (1st Cir. 2010) 597 F.3d 436, 452 (conc. opn. of Boudin, J.). Here, a trial by formula would have multiplied liability by preventing the defendant from proving its defenses to the claims of numerous class members. The inflated costs of settling such claims would "get[ ] passed along to the public." (*Id.* at p. 453 (conc. opn. of Boudin, J.).) When confronted with such inflated costs, a company might pass some of the costs on to consumers in the form of higher prices. Or it might be forced to take some other action to offset those costs, such as scaling back its operations. In either situation, the ultimate burden would be borne by the public.

These serious policy implications all flow from the use of statistical sampling to preclude individual defenses to liability and

underscore the importance of ensuring that every defendant is afforded the due process right to present a defense.

CONCLUSION

For the foregoing reasons, in addition to those set forth by defendant in its appellant's opening and appellant's reply briefs, amici curiae respectfully urge that the trial court's certification order be reversed and the additional relief requested by defendant should be granted.

May 5, 2014

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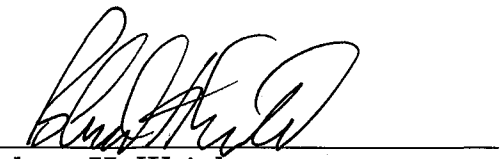
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 9,738 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: May 5, 2014



Robert H. Wright

B243788

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

JENNIFER AUGUSTUS et al,
Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC., formerly d.b.a. AMERICAN COMMERCIAL SECURITY SERVICES, INC.,
Defendant and Appellant.

APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT
JOHN WILEY, JR., JUDGE • CASE NO. BC336416, BC345918 AND CG5444421

[PROPOSED] ORDER GRANTING LEAVE TO FILE AMICI CURIAE BRIEF

IT IS HEREBY ORDERED that the application for leave to file an amici curiae brief by the Chamber of Commerce of the United States of America, the National Association of Security Companies, and the California Association of Licensed Security Agencies in support of defendant and appellant ABM Security Services, Inc. is granted. Any answer to the amici curiae brief may be served and filed by any party within __ days from the date of this order.

Dated: _____

_____
PRESIDING JUSTICE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

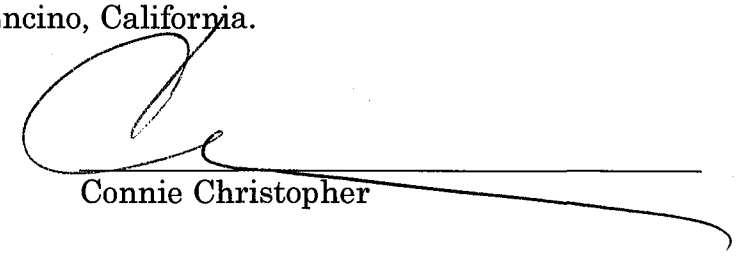
On May 5, 2014, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF SECURITY COMPANIES, AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES IN SUPPORT OF DEFENDANT AND APPELLANT ABM SECURITY SERVICES, INC.; [PROPOSED ORDER]** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 5, 2014, at Encino, California.



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